8-11-2014

Wickel v. Chamberlain Appellant's Brief 2 Dckt. 41514

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN WICKEL, an individual, Plaintiff/Appellant/Cross-Respondent v. DAVID CHAMBERLAIN, D.O., Defendant/Respondent/Cross-Appellant	**Supreme Court Docket No. 41514-13** Bonneville County Case No. CV-2012-0001

CROSS-APPELLANT BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho for Bonneville County.

Honorable Jon J. Shindurling, District Judge, Presiding.

For Plaintiff/Appellant/Cross-Respondent:

Michael D. Gaffney
John M. Avondet
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, ID 83404

For Defendant/Respondent/Cross-Appellant:

J. Michael Wheiler
Richard R. Friess
Thomsen Holman Wheiler, PLLC
2635 Channing Way
Idaho Falls, ID 83404

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules — Page

Statutes — Page

I. STATEMENT OF THE CASE

A. Nature of the Case.

This is a medical malpractice case. Mr. Wickel alleged Dr. Chamberlain breached the standard of care when he performed a hemorrhoidectomy and fissurectomy on Mr. Wickel. Dr. Chamberlain used a PPH device to perform the hemorrhoidectomy. Mr. Wickel claims that Dr. Chamberlain placed the staple line from the PPH too close to the dentate line in violation of the standard of care. During the hemorrhoidectomy, Dr. Chamberlain discovered an anal fissure and performed a fissurectomy on Mr. Wickel to repair the anal fissure. Fissurectomy is the gold standard procedure to repair an anal fissure. Mr. Wickel alleges Dr. Chamberlain did this without obtaining informed consent from Mr. Wickel.

B. Course of Proceedings Below.

Mr. Wickel filed his Complaint on January 3, 2012, after completing the pre-litigation screening process. R. Vol. I, p. 14. On February 26, 2013, Chamberlain filed a *Motion for Summary Judgment* on the basis that Wickel did not have the requisite expert testimony pursuant to I.C. § 6-1013, to prove his malpractice claims. In response, Wickel filed his *Memorandum in Opposition to Defendant's Motion for Summary Judgment* on March 22, 2103, along with several supporting affidavits, including the *Affidavit of Jessica Wilson* (R. Vol. I, p. 106) and the *Affidavit of Joseph A. Scoma, M.D.*. R. Vol. I, p. 95.

Jessica Wilson's affidavit stated that she had contacted all of the general surgeons in Idaho Falls but either could not find a general surgeon who performed hemorrhoidectomies using the PPH device or could not find a general surgeon who was willing to speak with Dr. Scoma about the local standard of care. She had the same experience with general surgeons in Pocatello. R. Vol. I, p. 106-

107. Ms. Wilson did not identify any of the physicians she allegedly contacted.

Dr. Scoma's affidavit stated that he had a conversation with a general surgeon in Twin Falls, Idaho, Dr. Stephen Schmid, regarding the standard of care with respect to performing the hemorrhoidectomy with the PPH device. R. Vol. I, p. 96. Dr. Scoma indicated that after his conversation with Dr. Schmid he determined that the community standard of care did not deviate from the national standard of care. R. Vol. I, p. 96-97. There was no discussion in Dr. Scoma's affidavit about how Dr. Schmid was familiar with the local standard of care or the national standard of care. In addition, there was no discussion regarding the standard of care for diagnosing anal fissures, performing fissurectomies or obtaining informed consent. *Id.*

Dr. Chamberlain filed a *Second Motion for Summary Judgment* on May 28, 2013, (R. Vol. I, p. 121) on the basis that there was no evidence that Dr. Schmid was familiar with the local standard of care in Idaho Falls, and, as a result, Dr. Scoma failed to show that he had actual knowledge of the applicable community standard of care for use of the PPH device, fissurectomies, and informed consent. R. Vol. I, p. 109.

Wickel filed his *Memorandum in Opposition to Defendant's Second Motion for Summary Judgment* on June17, 2013. R. Vol. II, p. 196. Wickel argued that the local standard of care in Idaho Falls with respect to the PPH device was indeterminable based on the Affidavit of Jessica Wilson and therefore, Scoma was allowed to supplement the local standard of care with the standard of care in a similar community. Wickel contended that Dr. Schmid had knowledge of the standard of care in a similar community, Twin Falls, and that Dr. Scoma familiarized himself with the Twin Falls standard of care through his conversation with Dr. Schmid. R. Vol. II, p. 207-213.

Chamberlain filed his *Reply Memorandum* on June 24, 2013, and again argued that Scoma

was not familiar with the local standard of care and that the standard of care was not indeterminable in Idaho Falls. Chamberlain also pointed out that whether Twin Falls was a similar community to Idaho Falls was a question of fact and there was no evidence in the record to support Wickel's assertion that Twin Falls was similar to Idaho Falls. R. Vol. II, p. 240-246.

The District Court granted Chamberlain's *Second Motion for Summary Judgment* on July 25, 2013. R. Vol. II, p. 405. The District Court found that the Idaho Falls standard of care with respect to the PPH device was indeterminable. R. Vol.I I, p. 411-12. However, the District Court also found that there were no facts to support the conclusion that Twin Falls was a similar community and that Dr. Scoma's affidavit lacked the necessary foundation. R. Vol. II, p. 412.

Wickel filed a *Motion for Reconsideration* on August 12, 2013, (R. Vol. III, p. 448) along with a *Supplemental Affidavit of Joseph A. Scoma, M.D.*. R. Vol. III, p. 420. The *Supplemental Affidavit of Scoma* set forth additional details about his conversation with Dr. Schmid and describe a second conversation Dr. Scoma had with Dr. Schmid regarding Dr. Schmid's practice history and his prior training and use of the PPH device. R. Vol. III, p. 421.

Wickel argued in his *Motion for Reconsideration* that the District Court erred when it considered and decided that there was no evidence supporting the conclusion that Twin Falls was a similar community to Idaho Falls because Chamberlain never raised the issue in his *Second Motion for Summary Judgment*. R. Vol. III, p. 426-429. In addition, Wickel argued that Twin Falls and Idaho Falls were indeed similar communities and listed facts and statistics in the brief which he contended the district court could take judicial notice of. R. Vol. III, p. 429-436.

Wickel also argued in his *Motion for Reconsideration* that the district court misapplied the law with respect to the local consulting physician. R. Vol. III, p. 436-444. According to Wickel, the

Court should not have decided whether Schmid had foundation about the Twin Falls and/or national standard of health care, but should have simply determined if there were sufficient facts in the record to generate triable issues about Dr. Schmid's knowledge of the Twin Falls and national standard of health care. R. Vol. III, p. 437- 438.

Chamberlain filed his *Brief in Opposition to Plaintiff's Motion for Reconsideration of Final Judgment* and a *Motion to Strike the Supplemental Affidavit of Joseph A. Scoma, M.D.* (R. Vol. III, p. 450) and a *Renewed Motion to Strike Exhibits from the Affidavits of John Avondet*. R. Vol. III, p. 459. Chamberlain asked the district court to strike Scoma's *Supplemental Affidavit* on the basis that it contradicted his prior deposition testimony and that it contained numerous conclusory and factually unsupported statements. R. Vol. III, p. 450-457.

In his *Brief in Opposition to Plaintiff's Motion for Reconsideration*, Chamberlain argued that the district court should not consider Dr. Scoma's *Supplemental Affidavit*, (R. Vol. III, p. 471-475), that it was proper for the district court to decided the issues of similar communities because Wickel placed the issue before the district court during the prior summary judgment proceedings (R. Vol. III, p. 475-77), and that Wickel had still failed to put evidence in the record supporting that Twin Falls and Idaho Falls were similar communities. R. Vol. III, p. 477-81. Chamberlain also explained that the district court did not misapply the law regarding local consulting physicians and that the FDA approval of the PPH device cannot be establish the local standard of care. R. Vol. III, p. 481-84.

Wickel filed his *Reply Memorandum in Support of Motion for Reconsideration* and *Memorandum in Opposition to Defendant's Motion to Strike the Supplemental Affidavit of Joseph A. Scoma, M.D.* on August 22, 2013. R. Vol. III, p. 496. The *Reply Memorandum* contended that

Scoma's Supplemental Affidavit contained all the necessary information needed to show that Schmid had foundation to discuss the Twin Falls and national standard of care. R. Vol. III, p. 501-511. Wickel again argued that Chamberlain failed to raise the issue of similar communities in his Second Motion for Summary Judgment and that the district court should give Wickel all favorable inferences regarding the similarity of Idaho Falls and Twin Falls. R. Vol. III, p. 511-516. Wickel also again argued that the Court misapplied the law regarding local, consulting physicians. R. Vol. III, p. 516-18. Finally, Wickel argued that the district court should not have entered judgment dismissing the informed consent and failure to diagnose the fissure claims and that the district court should rule on the applicability of the FDA approval of the PPH device. R. Vol. III, p. 519-22.

The District Court denied Wickel's *Motion for Reconsideration* on September 30, 2013. R. Vol. III, p. 526. The Court found that it could consider Scoma's *Supplemental Affidavit* and denied Chamberlain *Motion to Strike Scoma's Supplemental Affidavit*. R. Vol. III, p. 529-30. The Court also granted in part and denied in part Chamberlain's *Motion to Strike the Exhibits from the Affidavits of John Avondet*. R. Vol. III, p. 536-39. The district court also found that Scoma's Supplemental Affidavit was sufficient to demonstrate that Dr. Schmid had foundation to testify about the Twin Falls standard of care. R. Vol. III, p. 531-33.

However, the district court ruled that Wickel had waived his right to object to the Court deciding the issue of similar communities when he raised the argument in his Reply Brief, never raised the issue prior to his Motion for Reconsideration, and/or never requested a continuance. R. Vol. III, p. 533-34. The district court also found that Wickel failed to put sufficient evidence in the record to establish that Twin Falls and Idaho Falls were similar communities. R. Vol. III, p. 534-36.

On October 28, 2013, this Court issued an *Order Remanding to District Court* giving the

district court jurisdiction to enter a corrected final judgment. This Order suspended the appeal until a corrected final judgment was entered after which it would proceed.

Wickel filed a *Second Motion for Reconsideration* on October 30, 2013, along with a *Second Supplemental Affidavit of Dr. Scoma*. R. Vol. III, pp. 574-88. The district court entered its corrected Final Judgment on October 31, 2013. R. Vol. III, p. 589. Chamberlain filed his *Objection and Memorandum in Opposition to Plaintiff's Second Motion for Reconsideration* on November 12, 2013, arguing that the district court did not have jurisdiction to hear Wickel's Second Motion for Reconsideration, that it was untimely, and that in any event, it failed to correct the evidentiary deficiencies that allowed the district court to grant Chamberlain summary judgment. R. Vol. III, p. 592-607.

On November 14, 2013, Chamberlain filed an *Alternative Motion for Reconsideration* and the *Affidavit of Dr. James Richards*. R. Vol. III, p. 608-14. The Affidavit of Dr. Richards set forth that he and his partner Dr. Stephen Carter, performed hemorrhoidectomies using the PPH device in 2010 in Idaho Falls. R. Vol. III, p. 613. The district court heard argument on the issue of jurisdiction relating to Wickel's Second Motion for Reconsideration on November 18, 2013. R. Vol. III, p. 623. On December 18, 2013, the district court issued its *Opinion and Order Denying Wickel's Second Motion for Reconsideration* ruling that it would not hear Wickel's Second Motion for Reconsideration. R. Vol. III, p. 625. Wickel filed an *Amended Notice of Appeal* on December 23, 2013. R. Vol. III, p. 630. Chamberlain filed a *Second Amended Notice of Cross-Appeal* on December 30, 2013. R. Vol. III, p. 636.

C. Statement of Facts.

1. John Wickel had a ten year history of hemorrhoids. R. Vol. I, p. 64 *(Wickel Depo.*, p. 26, ll. 4-7). The medical records indicate he had a hemorrhoid problem throughout his adult life. *Affidavit of David Chamberlain, D.O.*, R. Vol. I, p. 41, para. 3. Mr. Wickel recalled having hemorrhoid problems about four times per year. R. Vol. I, p. 64 *(Wickel Depo.*, p. 26, ll. 8-10). Mr. Wickel testified that the pain with most episodes was minimal–"uncomfortable but not a show stopper." R. Vol. I, p. 64 *(Wickel Depo.*, p. 26, ll. 22-25).

2. However, Mr. Wickel testified that in about October of 2009, the rectal pain with the hemorrhoids increased "significantly" and became constant. R. Vol. I, p. 64 (*Wickel Depo.*, 27, ll. 23-25; p. 28, ll. 1-15; p. 29, ll. 1-7). The pain did not go away–**"it was hurting all the time**." R. Vol. I, p. 30 (*Wickel Depo.* p. 30, ll. 1-3). This was alarming to him. R. Vol. I, p. 64 *(Wickel Depo.*, p. 27, ll. 22-25; p. 28, ll. 1). The pain doubled in intensity from what he had previously experienced. R. Vol. I, p. 64 *(Wickel Depo.*, p. 28, ll. 11-15). It was beyond discomfort. *Id.*

3. Mr. Wickel further testified that he initially tried over-the-counter medications like Preparation-H and Hydrocort. R. Vol. I, p. 64-67 *(Wickel Depo.*, p. 29, ll. 3 - 24; p. 32, ll. 8 - p. 34, ll. 16; p. 40, ll. 9 - 19). When that did not work, in November or December 2009, he went to see a family practitioner in Wyoming near where Mr. Wickel lived. R. Vol. I, p. 65 *(Wickel Depo*, p. 31, ll. 5 - 16). Dr. Kirk or his physician's assistant performed a rectal examination on Mr. Wickel and told him that he had hemorrhoids. R. Vol. I, p. 66 *(Wickel Depo.*, p. 34, ll. 17-20). There was no mention of a fissure. R. Vol. I, p. 66 *(Wickel Depo.*, p. 34, ll. 5-12).

4. Either Dr. Kirk or his physician's assistant gave Mr. Wickel a prescription for ProctoFoam. R. Vol. I, p. 65 *(Wickel Depo.*, p. 32, ll. 1-10). He continued using Psyllium Husks,

which he thought was a purer form of Metamucil. R. Vol. I, p. 67 *(Wickel Depo.*, p. 40, ll. 9-19). He had been using this fiber supplement for many years. *Id.* Mr. Wickel testified that these medications and the fiber provided "insufficient relief." R. Vol. I, p. 66 *(Wickel Depo.*, p. 34, ll. 12-16). Although he couldn't remember for sure, Mr. Wickel likely called in sick due to the rectal symptoms he was experiencing. R. Vol. I, p. 67 *(Wickel Depo.*, p. 41, ll. 11-14). He recalled thinking, "this is ridiculous." *Id.*

5. He saw Dr. Kirk or his physician's assistant two or three times. R. Vol. I, p. 65 *(Wickel Depo.*, p. 32, ll. 1-7). Finally, they told him, "You've got some pretty severe hemorrhoids right here. You probably better go see someone else if they're bothering you so much." R. Vol. I, p. 67 *(Wickel Depo.*, p. 39, ll. 2-9). He was then referred to Dr. Chamberlain. R. Vol. I, p. 67 *(Wickel Depo.*, p. 38, ll. 19-24; p. 39, ll. 7-9). After the conservative care provided by the Wyoming health care providers failed, Mr. Wickel made the appointment with Dr. David Chamberlain. *Id.*

6. Dr. Chamberlain first saw Mr. Wickel on January 4, 2010. R. Vol. I, p. 53 *(Deposition of David Chamberlain, D.O.*, p. 42, ll. 21-24). Mr. Wickel was an airline pilot which required him to sit for extended periods of time. R. Vol. I, p. 55 *(Chamberlain Depo.*, p. 50, ll. 15 - p. 51, ll. 9); R. Vol. I, p. 63 *(Wickel Depo*, p. 7, ll. 19 - p. 8, ll. 1); R. Vol. I, p. 68 (*Wickel Depo.*, p. 58, ll. 3-10).

7. Mr. Wickel presented to Dr. Chamberlain with complaints of pain with hemorrhoids. R. Vol. I, p. 54 (*Chamberlain Depo.*, p. 46, ll. 25 - p. 47, ll. 9; p. 48, ll. 5 -12; p. 55, ll. 21 - p. 56, ll. 12).

8. Dr. Chamberlain performed a rectal examination on Mr. Wickel. He diagnosed Mr. Wickel with grade III (thrombosed, extruding, painful) internal hemorrhoids and external

hemorrhoids. R. Vol. I, p. 54 *(Chamberlain Depo*, p. 48, ll. 5 - 8). However, Dr. Chamberlain could not complete the examination due to Mr. Wickel's complaints of pain. He therefore informed Mr. Wickel that he would need to do a rectal exam under anesthesia in order to do a complete evaluation. R. Vol. I, p. 54 *(Chamberlain Depo*., p. 48, ll. 13 - p. 49, ll. 11); R. Vol. I, p. 69 (*Wickel Depo*., p. 64, ll. 9 - p. 65, ll. 2).

9. In light of the fact that conservative medical treatment had already failed to resolve the Grade III hemorrhoids, Dr. Chamberlain recommended that Mr. Wickel undergo an internal hemorrhoidectomy using a PPH[1] device and an external hemorrhoidectomy using a harmonic scalpel.. R. Vol. I, p. 54-55 *(Chamberlain Depo*, p. 49, ll. 1 - p. 50, ll. 4). Dr. Chamberlain discussed with Mr. Wickel the risks, alternatives, and benefits of having an internal hemorrhoidectomny with a PPH device and an external hemerrhoidectomy with a scalpel. R. Vol. I, p. 56 *(Chamberlain Depo*., p. 54, ll. 5 -24).

10. On January 4, 2010, Mr. Wickle signed a Financial Policy form which also contained a Consent for Treatment. R. Vol. I, p. 70 *(Wickel Depo*., p. 67, ll. 7-21); R. Vol. I, p. 74. This form stated, "I hereby authorize and request David J. Chamberlain, D.O., P.A., ... to provide me with any and all necessary evaluations and/or treatment." *Id.* It further stated, "I have read and understand the financial policy/consent for treatment and agree to be bound by its terms." *Id.* This is the last sentence on the form and is located just above the signature line containing Mr. Wickel's signature. *Id.*

---

[1] A medical device which is inserted into the rectum and then by way of a circular stapling process, removes the hemorrhoid tissue and closes the wound.

11. Mr. Wickel signed another one-page Surgical Procedure Consent form prior to surgery. R. Vol. I, p. 70 *(Wickel Depo.*, p. 67, ll. 22-25; p. 68, ll. 1-13); R. Vol. I, p. 76. That consent form states, in part, "I consent to the performance upon: John Wickel The following operation or procedure: Rectal exam under anesthesia with internal and external hemorrhoidectomy with PPH and harmonic scalpel." R. Vol. I, p. 76. Mr. Wickel's initials are affixed next to that paragraph of the consent form. *Id.*

12. The consent form also contains the following language: "2. The nature and purpose of the operation or procedure, the risks of the operation or procedure, and the possibilities of complications and alternate treatment options have been explained to me. 3. **It has been explained to me that a satisfactory result is expected but that the following are some of the complications or effects that could or may occur: Bleeding, infection, damage to adjacent tissues or organs, swelling, pain, suture reaction, delayed healing, scarring, anesthesia or medication reaction, recurrence, additional operations, and in rare instances, paralysis or death.**" (Emphasis in original). *Id.* Mr. Wickel's initials are affixed next to each of those paragraphs. *Id.*

13. The consent form stated, "4. No guarantee or assurance has been given by anyone as to the results that may be obtained." *Id.* Mr. Wickel initialed next to paragraph 4. *Id.*

14. The consent form also stated, "I consent to the doctors performing whatever different surgery or procedure they deem necessary or advisable during the course of the operation or procedure...." R. Vol. I, p. 55-56 *(Chamberlain Depo.*, p. 53, ll. 23 - p. 54, ll. 4). Again, Mr. Wickel's initials are affixed next to this paragraph. R. Vol. I, p. 76.

15. Mr. Wickel initialed next to paragraph 8 of the consent form which stated, "I understand that I am encouraged and invited to ask any questions I may have and all of my questions have been answered to my satisfaction." R. Vol. I, p. 76.

16. Mr. Wickel placed his signature underneath the words, "**I HAVE READ AND UNDERSTAND WHAT THIS FORM CONTAINS**," on the consent form. (Emphasis in original.) R. Vol. I, p. 76.

17. Prior to the operation, Mr. Wickel informed Dr. Chamberlain that he wanted Dr. Chamberlain to do whatever needed to be done to make sure his problems were corrected. R. Vol. I, p. 56 *(Chamberlain Depo.*, p. 52, ll. 2-7; p. 54, ll. 25 - p. 55, ll. 20). Mr. Wickel testified as follows: "...**if he could fix the** hemorrhoid **pain I was having**, yes, that's what I wanted him to do. If that was the way to treat them, to treat hemorrhoids, I wanted to have surgery, if he felt that's the way to get rid of them." R. Vol. I, p. 68 *(Wickel Depo.*, p. 61, ll. 8-13) (Emphasis added.).

18. With the written consents and direction from Mr. Wickel in hand, Dr. Chamberlain performed the rectal examination under anesthesia and the internal and external hemorrhoidectomy on January 8, 2010. R. Vol. I, p. 53 *(Chamberlain Depo.*, p. 43, ll. 7-11). This required putting Mr. Wickel under the effects of a general endotracheal anesthetic. During the procedure, in addition to the hemorrhoids, Dr. Chamberlain discovered that Mr. Wickel had a fissure. R. Vol. I, p. 55 *(Chamberlain Depo.*, p. 51, ll. 16-22). A fissure is a cut or tear in the lining of the anal canal.

19. Based upon Mr. Wickel's stated desire to have done whatever was needed to correct his condition and to avoid the additional risks of bringing Mr. Wickel out of anesthesia to discuss the risks and alternatives and then, some days or weeks later, putting him under anesthesia again, Dr.

Chamberlain performed a fissurectomy and internal lateral sphincterotomy (ILS).[2] R. Vol. I, p. 55-56 (*Chamberlain Depo.*, p. 52, ll. 12 - 23; p. 54, ll. 25-p. 55, ll. 20). Dr. Chamberlain noted in his operative report that Mr. Wickel tolerated the procedure well and there were no complications. See *Chamberlain Aff.*, p. 2, para. 4. R. Vol. I, p. 41.

20. The pathology report from the tissue removed by the PPH procedure indicated hemorrhoids. There was no sphincter or muscle tissue identified by pathology in the samples. R. Vol. I, p. 41, para. 5.

21. Dr. Chamberlain tells all patients who undergo any rectal procedure (including PPH and/or ILS) the same thing; there is at least a three percent chance of urgency or incontinence associated with these types of procedures. R. Vol. I, p. 55 *(Chamberlain Depo.*, p. 53, ll. 17 - 22).

22. On January 21, 2010, a left greater saphenous vein radiofrequency ablation was performed on Mr. Wickel in Dr. Chamberlain's office. R. Vol. I, p. 41, para. 7. At that time, other than some post-operative pain from the rectal surgery, Mr. Wickel had **no other complaints**. *Id.*

23. On January 28, 2010, Mr. Wickel called Dr. Chamberlain's office complaining of night sweats. R. Vol. I, p. 41-12, para. 8. Mr. Wickel reported that he did not have increasing pain in the rectal area. *Id.* Dr. Chamberlain believed Mr. Wickel was suffering from possible hypoxia from the narcotics he was taking. *Id.* He instructed Mr. Wickel to stop taking the Lortab and start taking Ultracet. *Id.* Dr. Chamberlain's office phoned in a prescription for Mr. Wickel. *Id.*

---

[2] Fissurectomy and ILS are the gold standard for repairing a fissure. R. Vol. I, p. 55 *(Chamberlain Depo.*, p. 52, ll. 17 - 19). The fissurectomy basically consists of cauterizing the base of th cut or tear to make a new wound which will want to heal. R. Vol. I, p. 55 *(Chamberlain Depo.*, p. 52, ll. 20 - 24; p. 53, ll. 1-6). The ILS involves dividing the internal sphincter muscle one time laterally to allow relaxation of the muscles and encourage healing. *Id.*

24. Dr. Chamberlain next saw Mr. Wickel regarding his hemorrhoids on February 2, 2010. Mr. Wickel reported that he was recovering well from the surgery at that time. R. Vol. I, p. 57 *(Chamberlain Depo.*, p. 66, ll. 22 - p. 67, ll. 12). However, at that time Mr. Wickel reported that he was having mild incontinence problems. R. Vol. I, p. 42, para. 9. Dr. Chamberlain recommended that Mr. Wickel stop taking stool softeners but continue taking Citrucell once daily. *Id.* He advised Mr. Wickel to start doing Kegel exercises[3] and informed him that minor incontinence usually is temporary and improves with time and healing but it can be permanent. *Id.*

25. Dr. Chamberlain saw Mr. Wickel again on February 17, 2010. R. Vol. I, p. 57 *(Chamberlain Depo.*, p. 68, ll. 15-19). At that time the operative site in the rectum had healed over nicely but Mr. Wickel had developed a perirectal abscess (infection). R. Vol. I, p. 58 *(Chamberlain Depo.*, p. 71, ll. 10-18; p. 72, ll. 1-5).

26. Dr. Chamberlain recommended incision and drainage of the perirectal abscess to which Mr. Wickel agreed. R. Vol. I, p. 42, para. 10. Dr. Chamberlain made a small incision in the area of concern posterior to the anus and purulent material was drained. *Id.* The area was then probed with sterile Q-tips, hydrogen peroxide and iodoform gauze and a sterile dressing was applied. *Id.* Dr. Chamberlain prescribed Cipro for Mr. Wickel for ten days and wanted to follow up with Mr. Wickel in one week. *Id.*

---

[3] A pelvic floor exercise which consists of contracting and relaxing the muscles that form part of the pelvic floor. Many actions are controlled by the pelvic muscles, including "holding in" urine or avoiding defecation. Reproducing these types of muscle actions can yield stronger sphincter tones. In men, these exercises strengthen the anal sphincter muscles because the anus is the main area contracted when the exercise is performed.

27. Testing of the fluid removed from the abscess indicated it was culture sensitive to fluoroquinolones.[4] R. Vol. I, p. 42, para. 11.

28. Dr. Chamberlain next saw Mr. Wickel on February 24, 2010. R. Vol. I, p. 43, para. 12. At that time, Mr. Wickel reported his perirectal pain was remarkably improved but he was still experiencing some pain and was have some drainage from the abscess. *Id.* Mr. Wickel reported that he had been taking his oral antibiotics. *Id.* A rectal examination revealed that the previous abscess site was nearly healed over with a small opening that still had some purulent drainage. *Id.*

29. Dr. Chamberlain recommended slightly opening the drainage site to allow for better drainage. R. Vol. I, p. 43, para. 12. Dr. Chamberlain opened the drainage sight with a number 11 scalpel and probed the abscess cavity with sterile Q-tips and hydrogen peroxide. *Id.* Dr. Chamberlain noted that the abscess cavity was much smaller than on the prior visit. *Id.* He recommended that Mr. Wickel continue with the oral antibiotics and switched him to Levaquin. *Id.* He discussed with Mr. Wickel the possibility of a chronic anal fistula developing and the possible need for further surgery in the future. *Id.*

30. Mr. Wickel's next visit with Dr. Chamberlain was on March 3, 2010. The abscess appeared to have healed. Dr. Chamberlain believed that Mr. Wickel was doing well enough at that time to be discharged from his care. Mr. Wickel was to follow up with him as needed. R. Vol. I, p. 59 *(Chamberlain Depo.*, p. 74, ll. 3 - p. 75, ll. 12).

31. Dr. Chamberlain was later advised telephonically that Mr. Wickel was seen by a physician's assistant in Wyoming on March 8, 2010 who opened the perirectal abscess and placed packing in it. R. Vol. I, p. 43, para. 14. The physician's assistant also reportedly gave Mr. Wickel

---

[4] Medicines that kill bacteria or prevent their growth.

antibiotics. *Id.* Dr. Chamberlain was informed that Mr. Wickel was seen in Wyoming by Dr. Kirk on March 9, 2010 and was started on Augmentin. *Id.* Dr. Kirk reportedly removed the packing placed by the physician's assistant to allow the abscess to drain. *Id.* Dr. Chamberlain requested that Mr. Wickel come to Idaho Falls for a visit but Mr. Wickel declined and informed Dr. Chamberlain that he had scheduled a follow-up visit with Dr. Kirk for March 11, 2010. *Id.*

32. Mr. Wickel returned to see Dr. Chamberlain on March 17, 2010. At that time, Mr. Wickel had developed a chronic anal fistula and Dr. Chamberlain recommended that Mr. Wickel see a colorectal surgeon for evaluation and treatment of the fistula. R. Vol. I, p. 59 *(Chamberlain Depo.*, p. 77, ll. 2-21).

33. After his March 17, 2010 visit with Dr. Chamberlain, Mr. Wickel was treated by two different physicians, Peter Bossart, M.D., and William Peche, M.D., colorectal surgeons in Salt Lake City, Utah. R. Vol. I, p. 44, para. 15. They each performed rectal surgeries on Mr. Wickel. *Id.* Despite multiple surgeries, Wickel still has complaints about rectal and incontinence problems.

II. ISSUES PRESENTED ON CROSS-APPEAL

1. Did the District Court err in holding that the local standard of health care practice for general surgeons in Idaho Falls, Idaho in January of 2010 was indeterminable?
2. If the trial court did not err in finding that the local standard of health care practice was indeterminable with respect to the PPH procedure, does that holding relieve the plaintiff's burden of establishing the Idaho Falls, Idaho standard of health care practice for general surgeons in January of 2010 as to all other issues, such as diagnosing an anal fissure and/or fistula, the proper treatment of anal fissure, and informed consent for the treatment of anal fissure and/or fistula?

3. In deciding plaintiff's *Motion for Reconsideration*, did the trial court err in considering the supplemental affidavit of the out-of-state expert, Dr. Scoma?

   (i) Should Idaho recognize the sham affidavit doctrine and was the *Supplemental Affidavit of Dr. Scoma* a sham affidavit?

   (ii) Should the trial court have accepted the new information contained in the *Supplemental Affidavit* of Dr. Scoma?

   (iii) Were certain statements contained in the Dr. Scoma's *Supplemental Affidavit* admissible?

4. Did the plaintiff offer sufficient admissible evidence to establish that the out-of-state expert was familiar with the appropriate local standard of health care practice?

   (i) Was there sufficient evidence in the record to establish that the local standard of health care practice was replaced by a national standard of health care practice?

   (ii) Is it sufficient for a physician to simply tell the out-of-state expert that the local standard of health care practice was the same as a national standard of health care practice or is the physician required to demonstrate that he or she is actually familiar with the alleged national standard of health care practice?

III. ARGUMENT

A. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT THE LOCAL STANDARD OF HEALTH CARE PRACTICE IN IDAHO FALLS WAS INDETERMINABLE WITH REGARD TO THE PPH PROCEDURE.

1. *Standard of Review.*

The Court exercises free review over questions of law. This Court also exercises free review over matters of statutory interpretation. The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. A statute is ambiguous where the language is capable of more than one reasonable construction. This Court has consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature. *Brannon v. City of Coeur D'Alene*, 153 Idaho 843, 848-49 (2012) (internal citations and quotations omitted).

2. *The Idaho Falls standard of care was not indeterminable.*

In its *Opinion and Order on Defendant's Second Motion for Summary Judgment*, the District Court held that the Idaho Falls standard of care was indeterminable. R. Vol. II, p. 411-12.

I.C. § 6-1012 states in relevant part:

> Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. **If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered**. As used in this act, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.

I.C. § 6-1012 (emphasis added).

This Court has held that "a plaintiff may establish the community standard of care by reference to similar communities only where no local doctor other than the defendant exists" and that plaintiffs "cannot establish the local standard of care by reference to similar communities until [the

plaintiff] has demonstrated that the standard of care . . . was indeterminable due to the absence of other health care providers in the community." *Morris v. Thomson*, 130 Idaho 138, 146-47 (1997).

This Court first addressed the issue of when a plaintiff may establish the community of care by reference to similar communities in *Hoene v. Barnes*, 121 Idaho 752 (1992). *Hoene* involved a case in which the defendant and his partner were the only "provider" in the entire state of Idaho. *Id.* at 754. As such, the court concluded that the standard of care was indeterminable. That is clearly not the case here. The following is a list of general surgeons in Idaho Falls other than Dr. Chamberlain and his two partners who appear to have been licensed to practice in Idaho prior to 2010:

1. Gregory Hodson, M.D. was licensed to practice since 1994.
2. Christopher Riley, M.D. was licensed to practice since 1988.
3. Judy Jones, M.D. was licensed to practice since 1983.
4. Brian Obyrne, M.D. was licensed to practice since 1992.
5. Stephen Carter, M.D. was licensed to practice since 1980.
6. James Richards, M.D. was licensed to practice since 1979.
7. Boyd Hammond, M.D. was licensed to practice since 1978.

R. Vol. II, p. 268-81 (Idaho Board of Medicine Public Record Information regarding the above referenced general surgeons). Likewise, there are a number of general surgeons in Rexburg, Blackfoot, and Pocatello. *Id.*

Thus there were a number of other general surgeons practicing in Idaho Falls and surrounding geographical area ordinarily served by the general hospital in Idaho Falls during the relevant time period. In *Morris v. Thomson*\, 130 Idaho 138, 937 P.2d 1212 (1997), the plaintiff argued that she

faced a situation similar to *Hoene* because the doctors practicing in the Emmett, Idaho community at the relevant time were either unavailable or biased in favor of the defendant and therefore, her out-of-area expert could not familiarize himself with the local standard of care. *Id.* at 147.

The Idaho Supreme Court declined to apply *Hoene*, stating "In that case, the plaintiff first demonstrated that **no health care provider other than the defendant** or his business associates practiced in the local community and thus the local standard of care was indeterminable. Only then did we turn to 'similar communities' to establish the relevant standard of care." *Id.* (emphasis added). The court went on to state, "Morris cannot establish the local standard of care by reference to similar communities until she has demonstrated that the standard of care in Emmett was indeterminable due to the **absence of other health care providers** in the community. ... Morris has failed to establish that no other health care provider was practicing in Emmett at the time of Jessie's birth through which her expert could have familiarized himself with the local standard of care." *Id.* (emphasis added).

In this case, the Court relied upon the *Affidavit of Jessica Wilson* and Dr. Chamberlain's deposition testimony that he was unaware of other general surgeons in Idaho Falls who used the PPH procedure to find that the standard of care was indeterminable. R. Vol. II, p. 411-12. However, this does not meet the standard set forth in *Morris* and the plain language of the statute that there was an absence of any other health care provider in the community.

The fact that Dr. Chamberlain may not have been aware of other general surgeons using the PPH device in 2007 does not mean no other general surgeons were familiar with or had experience with the PPH device sufficient to provide Dr. Scoma with the relevant local standard of care. The fact is, Dr. Scoma did not even make the effort to contact any of the general surgeons in Idaho Falls

who may have had knowledge of the standard of care in January of 2007. R. Vol. I, p. 95 - 100. As such, based upon the record, there was no way to know what information the other general surgeons may or may not have known regarding the standards applicable to the PPH procedure.

Second, the *Affidavit of Jessica Wilson* merely indicates that she made some effort to contact general surgeons in Idaho Falls regarding their use of the PPH devise. R. Vol. I, p. 106, para. 3. However, Ms. Wilson does not state specifically who she contacted so there is no way to determine if she in fact contacted all of the appropriate general surgeons in Idaho Falls. Additionally, her affidavit specifically states that she phoned the general surgeons "to inquire whether they performed hemorrhoidectomies using the PPH device." *Id.* She did not reference any time period pertaining to her inquiry.

Ms. Wilson's statements are broad and conclusory. Was she asking about whether the general surgeons currently used the PPH device or had they used the PPH device in the past, including 2007? Did she ask whether any of these surgeons had any experience or training using the PPH device or whether any of them were aware of the standards of care applicable to using the PPH device in 2007? The record provides no answers to these critical questions with regard to whether the standard of care in Idaho Falls regarding the use of the PPH device was indeterminable. It was Wickel's burden to establish an appropriate record from which such determinations could be made.

Given the glaring deficiencies in Wickel's effort to show an absence of other health care providers in the community, the district court should not have found that the local standard of care was indeterminable. That portion of the district court's decision should be reversed.

B. WICKEL WAS STILL REQUIRED TO ESTABLISH THE LOCAL STANDARD OF CARE AS TO ALL OTHER ISSUES EVEN IF THE STANDARD OF CARE WAS INDETERMINABLE REGARDING USE OF THE PPH DEVICE.

1. *Additional Standard of Review.*

The Court is required to look at the expert's affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 163, 45 P.3d 816 (2002); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994). However, the liberal construction and reasonable inference standard does not apply when deciding whether testimony offered in connection with a summary judgment motion is admissible. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 163, 45 P.3d 816 (2002); *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997). The Supreme Court reviews challenges to the trial court's evidentiary rulings under the abuse of discretion standard. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

2. *Wickel failed to establish that Chamberlain breached the applicable standard of care with respect to his remaining non-PPH claims.*

The trial court is authorized to narrow the standard of care issues involved in a case. *See, Suhadolnik v. Pressman*, 151 Idaho 110, 120 (2011). The standards applicable to the use of the PPH device were not the only standards at issue in this case. Wickel alleged that Dr. Chamberlain breached the local standard of care by "failing to diagnose Wickel's anal fissure on the initial visit" and "failed to acquire Wickel's informed consent prior to performing medical procedures related to the anal fissure." R. Vol. I, p. 15, para. 20-21. The local standard of care must be established as to these other claims in addition to the standard for use of the PPH device.

Dr. Scoma testified that Dr. Chamberlain should have diagnosed a fissure as the source of Wickel's problems rather than hemorrhoids. R. Vol. I, p. 98, para. 11. Certainly, any of the general surgeons in Idaho Falls should have had knowledge of the standards applicable to diagnosing a fissure. However, the record is devoid of any effort on the part of Dr. Scoma or Wickel to contact one of these surgeons to discuss those standards. As such, Wickel has not demonstrated that the standard of care was indeterminable as to this allegation.

Wickel also claimed that Dr. Chamberlain breached the local standard of care with respect to the fissurectomy and lateral internal sphincterotomy. Again, the record is devoid of any effort by Dr. Scoma or Wickel to discuss the standards of care relative to those procedures with any of the general surgeons in Idaho Falls during the relevant time period. Certainly, Dr. Chamberlain and his two partners were not the only ones performing those procedures during that time period and it is incumbent upon Wickel to establish the absence of general surgeons capable of speaking to those standards. He has failed to do so.

Dr. Scoma testified that Dr. Chamberlain violated the local standard of care by dilating the anal canal and then also performing the sphincterotomy. R. Vol. I, p. 98, para. 13. According to Dr. Scoma, dilating the anal canal would have been sufficient to treat the fissure and therefore the sphicterotomy was unnecessary. Certainly, there were other general surgeons in Idaho Falls besides Dr. Chamberlain and his two partners who were qualified to discuss dilation of the anal canal as an adequate remedy for treating a fissure. Yet the record is devoid of any effort on the part of Dr. Scoma or Wickel to visit with an Idaho Falls general surgeon to discuss those standards. As such, Wickel has failed to demonstrate that the local standard of care was indeterminable with regard to this issue.

Dr. Scoma also claimed that Dr. Chamberlain violated the local standard of care in his treatment of the fissure and fistula. R. Vol. I, p. 99, para. 14. As noted above, the record is devoid of any effort by Dr. Scoma to discuss the standards of care relative to the treatment of fissures and/or fistulas in Idaho Falls, Idaho by general surgeons in 2007. Certainly Dr. Chamberlain and his two partners were not the only general surgeons in Idaho Falls qualified to render such care. No evidence was presented by Wickel to establish such a claim. As such, Wickel has failed to demonstrate that the local standard of care on that issue was indeterminable.

Dr. Scoma also contends that Dr. Chamberlain failed to obtain informed consent from Wickel for the fissurectomy and lateral internal sphincterotomy (LIS). R. Vol. I, p. 100, para. 17. The informed consent statute requires Dr. Chamberlain to discuss with the patient the pertinent facts and considerations that would ordinarily be made and given under the same or similar circumstances "by a like physician ... of good standing practicing **in the same community**." Idaho Code §39-4506 (emphasis added). Again, the record is devoid of any effort by Dr. Scoma or Wickel to visit with a general surgeon in Idaho Falls to determine the standard of practice relating to informed consent discussions for fissurectomy and/or lateral internal sphincterotomy under the same or similar circumstances.

The fact that the District Court found the local standard of care in Idaho Falls with respect to the PPH procedure does not relieve Wickel from establishing the Idaho Falls, Idaho standard of care with respect to the issues discussed above. Not only has Wickel failed to demonstrate that the local standard of care was indeterminable with respect to use of the PPH device, he has also failed to establish that the local standard of health care practice was indeterminable with regard to the additional alleged breaches. Likewise, Wickel offered no evidence regarding the Idaho Falls standard

of health care practice pertaining to diagnosing anal fissures, treating anal fissures, fissurectomy, LIS, dilating the anal canal, or informed consent. Consequently, these additoinal claims should therefore be dismissed.

C. THE DISTRICT COURT ERRED WHEN IT CONSIDERED THE SUPPLEMENTAL AFFIDAVIT OF DR. SCOMA IN DECIDING PLAINTIFF'S MOTION FOR RECONSIDERATION.

1. *Additional Standard of Review.*

The interpretation of the Rules of Civil Procedure is a matter of law which the Court has free review. *Eby v. State*, 148 Idaho 731, 734 (2010).

2. *The District Court erred when it considered new evidence on Wickel's Motion for Reconsideration because a Final Judgment had been entered.*

Wickel filed his *Motion for Reconsideration* on August 12, 2013 (R. Vol. III, p. 448) which was accompanied by the *Supplemental Affidavit of Dr. Scoma.* R. Vol. III, p. 420. The *Supplemental Affidavit* contained additional details about Dr. Scoma's conversation with Dr. Schmid about the local standard of health care practice. R. Vol. III, p. 420-21, paras. 3-4. Chamberlain filed a *Motion to Strike the Supplemental Affidavit* and argued that the district court should not consider the additional evidence when deciding Wickel's *Motion for Reconsideration.* R. Vol. III, p. 450-57. The district court denied Chamberlain's Motion to Strike and ruled that it could consider the Supplemental Affidavit. R. Vol. III, p. 529-30. Chamberlain believes the district court's decision was erroneous.

The Supreme Court addressed the admissibility of new evidence under I.R.C.P. 11(a)(2)(B) and I.R.C.P. 59(e), in *PHH Mortgage Servs. Corp. v. Perreira*, 146 Idaho 631 (2009), stating:

> The trial court must consider new evidence that bears on the correctness of an interlocutory order if requested to do so by a timely motion under Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure. *Coeur d'Alene Mining Co. v. First Nat'l Bank*

> *of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). However, the trial court cannot consider new evidence when asked to reconsider a final judgment pursuant to a motion to alter or amend the judgment under Rule 59(e), id., or pursuant to a motion to amend findings of fact or conclusions of law under Rule 52(b).

Id. at 635.

After the district court's granted Chamberlain's *Second Motion for Summary Judgment*, it entered a *Final Judgment*, on July 30, 2013. R. Vol. II, p. 416. Wickel then filed a *Motion for Reconsideration* on August 12, 2013, requesting the district court reconsider "its Final Judgment entered on July 30, 2013." R. Vol. III, p. 448. Wickel also filed the *Supplemental Affidavit of Joseph Scoma, M.D.* at that time. Chamberlain argued that the district court could not consider the Supplemental Affidavit. R. Vol. III, p. 471-75.

I.R.C.P. 11(a)(2)(B) states:

> (B) Motion For Reconsideration. A motion for reconsideration of **any interlocutory orders** of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).

(Emphasis added.)

The district court found that it could consider new information because Wickel's *Motion for Reconsideration* sought reconsideration of the district court's summary judgment decision which was an interlocutory order R. Vol. III, p. 529-30. However, the district court's decision ignores this Court's ruling in *Boise Mode, LLC v. Donahoe Pace & Partners LTD*, 154 Idaho 99 (2013):

> Considering the plain language of the rule and its structure, there are two different kinds of orders that may be reviewed. **The first sentence permits a court to reconsider interlocutory orders any time prior to entry of final judgment** and the second sentence bars the court's reconsideration of orders that are made 1) after entry

> of final judgment, and 2) pursuant to a party's Rule 59(e) motion. **"This Court has repeatedly held that I.R.C.P. 11(a)(2)(B) provides a district court with authority to reconsider and vacate interlocutory orders so long as final judgment has not been entered."** *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 785, 69 P.3d 1035, 1046 (2003) (citing *Telford v. Neibaur*, 130 Idaho 932, 950 P.2d 1271 (1998)); *Sammis v. Magnetek Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997); *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994)).

Id. at 106-107 (emphasis added).

The Idaho Supreme Court expressly held that the rule allowing a court to reconsider and vacate interlocutory orders so long as a final judgment has not been entered also applies to reconsideration of a court's grant of summary judgment. *Id.* at 1119, footnote 4.

Due to the fact that the question on appeal turned upon an interpretation of IRCP 11(a)(2)(B), the Supreme Court in *Boise Mode* carefully discussed the definition of an interlocutory order, concluding that "an interlocutory order is an order that is temporary in nature or **does not completely adjudicate the parties' dispute**." *Id.* at 107 (emphasis added). The Court also noted, "A judgment, order, or decree which is intermediate or **incomplete** and, **while it settles some of the rights of the parties, leaves something remaining to be done in the adjudication of their substantial rights in the case** by the court entertaining jurisdiction of **the same is interlocutory.**" *Id.* (emphasis added).

The proceedings of the *Boise Mode* case are important given the Supreme Court's emphasis on the definition of the term interlocutory. The district court first granted summary judgment to Boise Mode and entered a final judgment. *Id.* at 103. Defendant then filed a Rule 59(e) motion to alter or amend the judgment which the district court granted, vacating the entry of summary judgment for plaintiff and reinstating all of the claims of the parties, including defendant's counterclaims. *Id.* Boise Mode then filed a motion to reconsider and Rule 59(e) motion requesting

that the district court reconsider the reversal of its previous order on summary judgment. *Id.* The district court granted Boise Mode's motion and reinstated the prior motion for summary judgment. *Id.* A final judgment was then entered. *Id.*

On appeal, defendant argued that Boise Mode's motion to reconsider under Rule 11(a)(2)(B) was inappropriate because the order was entered pursuant to Rule 59(e). *Id.* at 106. After carefully defining the term "interlocutory," the Idaho Supreme Court held that because the order the district court was asked to reconsider had reinstated all of the claims of the parties, it "was not a final order and its entry did not complete the adjudication of the parties' rights, it was an interlocutory order" and "in the absence of a final judgment, it was proper for the district court to revisit the merits of Boise Mode's prior summary judgment decision." *Id.*

In this case, the Court's *Opinion and Order* on summary judgment dismissed all of Wickel's claims and **completely adjudicated all of the parties' rights**. Pursuant to *Boise Mode*, it was not an interlocutory order. Further, the Court also entered a final judgment. A final judgment is not an interlocutory order nor is it an order "made after entry of final judgment."

The district court relied upon *Arregui v. Gallegos-Main*, 153 Idaho 801 (2012) to support its decision that it could consider new evidence on Wickel's Motion for Reconsideration even though it had entered a final judgment. R. Vol. III, pp. 529-530. However, while *Arregui* is a summary judgment case wherein final judgments were entered and motions to reconsider were entertained by the Court, it does not appear that any of the parties raised the issue of whether a Rule 11(a)(2)(B) motion was appropriate since the court was no longer dealing with an interlocutory order. That distinction is made clear in the *Boise Mode* case. That same distinction is applicable in this case.

Thus, pursuant to the language found in *Boise Mode* and *Elliott v. Darwin Neibaur Farms*,

138 Idaho 774 (2003), *Telford v. Neibaur*, 130 Idaho 932 (1998), *Sammis v. Magnetek Inc.*, 130 Idaho 342 (1997) and *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63 (1994), that "I.R.C.P. 11(a)(2)(B) provides a district court with authority to reconsider and vacate *interlocutory orders so long as final judgment has not been entered*," it was not proper for the district court to reconsider its decision under IRCP 11(a)(2)(B). The District Court should have only done a Rule 59(e) evaluation and determination.

3. *The District Court should not have considered new evidence pursuant to I.R.C.P. 59(e).*

The Court is not allowed to consider new evidence in a Rule 59(e) Motion. In *Barmore v. Perrone*, 145 Idaho 340 (2008), the Idaho Supreme Court explained the reasoning behind the prohibition of considering new evidence.

> A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. **Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.**

Id. at 344 (citing *Coeur d'Alene Mining Co. v. First National Bank of North Idaho*, 118 Idaho 812 (1990)) (emphasis added); *see also Johnson v. Lambros*, 143 Idaho 468 (Ct. App. 2006) (holding that because a motion to amend is brought after a judgment, new evidence may not be presented).

As such, the district court should not have considered the *Supplemental Affidavit of Dr. Scoma* as discussed above, but should have treated Wickel's *Motion For Reconsideration* as a Rule 59(e) Motion because of final judgment had been entered and made its ruling based upon the evidence in the record at the time the *Final Judgment* was entered.

D. THE DISTRICT COURT ERRED IN NOT STRIKING THE SUPPLEMENTAL AFFIDAVIT OF JOSEPH SCOMA, M.D..

1. *The District Court should have granted Chamberlain's Motion to Strike statements in paragraph 3 of the Supplemental Affidavit.*

Even assuming for the sake of argument only that the district court correctly treated Wickel's Motion as a *Motion for Reconsideration*, the district court erred in not striking the *Supplemental Affidavit of Dr. Scoma* either in part or in its entirety. Paragraph 3 of the *Supplemental Affidavit* contains entirely conclusory and factually unsupported statements which should be stricken from the record and not relied upon by the Court. R. Vol. III, p. 420-21. It alleges, that Dr. Schmid "conveyed to [Dr. Scoma] that there were no deviations in how he had been trained to use the PPH device in Twin Falls than anywhere else." *Id.* However, there is no evidence in Dr. Scoma's first affidavit or the *Supplemantal Affidavit* that Dr. Schmid received training on the PPH device in Twin Falls or that he had used the PPH device any where other than Twin Falls. As such, there is no factual basis for the claim that there were no deviations in how he had been trained to use the device from anywhere else. The statement is speculative, conclusory, and lacks sufficient factual foundation to be admissible.

The same holds true for the immediately preceding sentence, "Dr. Schmid told me that in January 2010 there was nothing unique or special about the manner in which hemorrhoidectomies were performed with the PPH device." R. Vol. III, p. 421. Where is the foundation to show how Dr. Schmid knows that? Has he used the PPH in other locations in the State of Idaho or outside the State of Idaho? If so, when and where? Other than the Salt Lake training (and we don't know for sure when that was even obtained), has he attended other training with regard to using the PPH to perform hemorrhoidectomies? If so, when and where? Has he spoken to other general surgeons

anywhere about how they use the PPH device to perform hemorrhoidectomies? If so, who and when? Has he read any medical journals describing how the PPH device is used to perform hemorrhoidectomies? If so, what? As it stands, the statement is simply conclusory and lacks any foundation.

Also in paragraph 3, Dr. Scoma alleges, "During our conversation he said that the standard of care for general surgeons in Twin Falls would be the same regardless of location, i.e., that the standard of care in Twin Falls was a national standard as opposed to including any unique deviations from the national standard of care." R. Vol. III, p. 421. This statement is similar to the prior statement contained in Dr. Scoma's first affidavit only now directed at Twin Falls rather than the entire state of Idaho. R. Vol. I, p. 95. Nevertheless, the statement is still speculative, conclusory and lacking in any factual foundation.

Even if a national standard exists, how does Dr. Schmid know what it is? Has he spoken with any other general surgeons outside of Twin Falls regarding the practice of using a PPH device? Has he even spoken with other general surgeons in Twin Falls regarding the practice of using a PPH device? Has he participated in training on how to use a PPH device any where other than Salt Lake City, Utah–seven to ten years ago? Was this alleged national standard the same in 2010 as it is today? What is the alleged national standard? Did Dr. Schmid and Dr. Scoma discuss what they each believed the alleged national standard regarding PPH was to make sure they were on the same page?

Without this information, how can the Court possibly know whether Dr. Schmid knew about the alleged "national standard of care" pertaining to the use of a PPH device in performing hemorrhoid surgery or that it is the same standard Dr. Scoma believes it is? The Court is still left

to speculate regarding these conclusory statements. As such, the district court should have struck them from the record.

Wickel argues that because Dr. Chamberlain and Dr. Schmid were both allegedly trained by the same physician, that is sufficient foundation for Dr. Scoma to know the appropriate standard of practice. In paragraph 4 of the *Supplemental Affidavit*, Dr. Scoma claims that Dr. Schmid said he received his training on the Ethicon device from Dr. Eyring in Salt Lake City, Utah. R. Vol. III, p. 421. The Court is not advised as to when that training took place. Dr. Scoma states that Dr. Schmid allegedly informed him that he has been treating hemorrhoids via hemorrhoidectomies with the PPH device for seven to ten years (presumably from August 6, 2013–the date of the most recent telephone call). R. Vol. III, p. 421.

As drafted, without venturing into the realm of speculation and conjecture, it is impossible to determine when Dr. Schmid received his training with Dr. Eyring. Even if the Court were to speculate that Dr. Schmid was originally trained on the PPH device by Dr. Eyring in Salt Lake City prior to performing his first procedure seven to ten years ago, that would mean he was trained sometime between 2003 and 2006. Dr. Chamberlain was trained in 2002. R. Vol. I, p. 157 (*Chamberlain Depo*, p. 19, ll. 24 - p. 20, ll. 5). Was the same training being provided by Dr. Eyring one to four years later? Based upon this record, we do not know. It would be speculative, at best, to conclude that because both surgeons were allegedly trained by the same physician approximately one to four years apart, the training they each received on using the PPH device was identical or that there were no significant differences.

2. *This Court should adopt the sham affidavit doctrine and strike the Supplemental Affidavit of Dr. Scoma under the same.*

During his deposition, Dr. Scoma testified that he and Dr. Schmid "just talked about what the **standard of care was for a general surgeon in Idaho** doing a **hemorrhoidectomy**." R. Vol. II, p. 264 (*Scoma Depo.*, p. 71, ll. 19-25). During that conversation, Dr. Schmid said that **"the standard of care in Idaho was the national standard of care. There's no difference whether it be in Twin Falls, Idaho Falls, or anywhere else**." R. Vol. II, p. 264 (*Scoma Depo.*, p. 71, ll. 19-25). Dr. Scoma could not recall anything else about that telephone conversation with Dr. Schmid. R. Vol. II, p. 264 (*Scoma Depo.*, p. 72, ll. 1-3).

According to Dr. Scoma's deposition testimony, Dr. Schmid told him that the Idaho standard of care for a general surgeon performing hemorrhoidectomies was a national standard of care–there allegedly was no difference whether that specific procedure was done in Twin Falls or Idaho Falls.[5]

However, in his *Supplemental Affidavit*, without the benefit of any kind of recording of the initial telephone conversation with Dr. Schmid, miraculously and just when Wickel needs it most, Dr. Scoma recalled additional information which he alleged Dr. Schmid provided to him during that conversation. This has all the markings of a sham affidavit. The Court should not sanction an expert witness testifying under oath to one thing and then providing different affidavit testimony later (which is not subject to cross examination) in an effort to avoid summary judgment. Such a practice is unfair and prejudicial to the opposing party. This Court should therefore adopt the sham affidavit doctrine and strike the *Supplemental Affidavit of Dr. Scoma*.

---

[5] This version of what occurred is consistent with Dr. Scoma's first affidavit in which he testified that based on his discussion with Dr. Schmid, it was his opinion that "**Physicians in Idaho practiced in conformance with the national standard of care in 2010**." R. Vol. I, p. 421, para. 5. For that reason, defendant challenged the foundation for Dr. Scoma or Dr. Schmid to make render such an opinion.

E. WICKEL DID NOT OFFER SUFFICIENT ADMISSIBLE EVIDENCE TO ESTABLISH THAT DR. SCOMA WAS FAMILIAR WITH THE APPLICABLE STANDARD OF HEALTH CARE PRACTICE.

1. *Standard of Review.*

The Court is required to look at the expert's affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 163, 45 P.3d 816 (2002); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994). However, the liberal construction and reasonable inference standard does not apply when deciding whether testimony offered in connection with a summary judgment motion is admissible. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 163, 45 P.3d 816 (2002); *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997). The Supreme Court reviews challenges to the trial court's evidentiary rulings under the abuse of discretion standard. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

2. *There is no evidence establishing that Dr. Schmid was familiar with the national standard of care in January of 2010.*

Dr. Scoma has attempted to testify that the Twin Falls standard of care does not deviate from the national standard of care. He bases this testimony on a telephone conversation he had with Dr. Schmid wherein Dr. Schmid stated "that the standard of care for general surgeons in Twin Falls would be the same regardless of location, i.e., that the standard of care in Twin Falls was a national standard." R. Vol. III, p. 421, para. 3.

Dr. Schmid's statement to Dr. Scoma - that the Twin Falls standard of care is the same as the national standard - is not sufficient to familiarize Dr. Scoma with the applicable standard of care. This Court has stated:

> Rule 56(e) of the Idaho Rules of Civil Procedure imposes additional requirements upon the admission of expert medical testimony submitted in connection with a motion for summary judgment. The party offering such evidence must show that it is based upon the witness' personal knowledge and that it sets forth facts as would be admissible in evidence. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, . 940 P.2d 1142 (1997); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994). The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994). **Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e).** *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997); *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 839 P.2d 1192 (1992).
>
> An expert testifying as to the standard of care in medical malpractice actions must show that he or she is familiar with the standard of care for the particular health care professional for the relevant community and time. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994). **The expert must also state how he or she became familiar with that standard of care**. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994).

Delaney v. St. Alphonsus Reg'l Med. Ctr., 137 Idaho 160, 164 (2002) (emphasis added).

In order to testify that the Twin Falls standard of health care practice was equivalent with some yet unidentified national standard of health care practice, there must be evidence establishing that Dr. Schmid was personally familiar with the alleged national standard of care. The record is devoid of any such evidence. To simply claim that an amorphous national standard of health care practice exists and that national standard was the standard of health care practice in Twin Falls in January 2010 is simply conclusory.

There is no mention in Dr. Scoma's first affidavit that Dr. Schmid was personally familiar with this claimed national standard of health care practice, only that Dr. Scoma himself determined that the Twin Falls standard of care was the same as the national standard of care. R. Vol. I, p. 96, para. 5. In Dr. Scoma's *Supplemental Affidavit*, he stated that Dr. Schmid "conveyed to me that there

were no deviations in how he had been trained to used the PPH device in Twin Falls than anywhere else" and that "the standard of care in Twin Falls was a national standard as opposed to including any unique deviations from the national standard of care." R. Vol. III, p. 420-21, para. 3. However, facts establishing how Dr. Schmid became aware that there were no differences from "anywhere else" or that there were no unique deviations from this yet undisclosed "national standard of care" are noticeably absent.

It is important to note that there is no other evidence about what the Twin Falls standard of care is. Thus, the only way for Dr. Scoma to know the actual Twin Falls standard of care was if he and Dr. Schmid both knew, discussed, and agreed upon what the alleged national standard of care was. However, there is no evidence in Dr. Scoma's affidavits that Dr. Schmid was personally familiar with the national standard of care in 2010 or how he obtained that information.

For example, no facts have been presented to support a finding that Dr. Schmid received PPH training anywhere but Salt Lake City, Utah or that he performed PPH anywhere but in Twin Falls, Idaho or that he discussed PPH with any other general surgeons anywhere outside of Twin Falls, Idaho. Where is the factual foundation for the assertion that the procedure was performed no differently in Twin Falls than anywhere else?

There are no facts indicating that the PPH training Dr. Schmid received in Salt Lake City was standardized and consistent with training provided across the country. Other than having the same instructor, there isn't even sufficient evidence to establish that the training Dr. Schmid received was the same as that obtained by Dr. Chamberlain. Wickel has produced no standards for performing PPH adopted or drafted by any national organization such as the American College of Surgeons to establish that some national standard of health care practice pertaining to PPH even exists. Neither

Dr. Scoma nor Dr. Schmid have ever stated where the claimed national standard of health care practice can be found or who determined what that standard should be.

Without evidence of Dr. Schmid's actual, personal familiarity with the alleged national standard of care, Dr. Schmid has no foundation upon which to testify that the Twin Falls standard of health care practice was the same as some national standard of care in January 2010. The Court correctly found as much in its July 25, 2013 *Opinion and Order on Defendant's Second Motion for Summary Judgment,* stating that "Dr. Schmid's statement that the local standard of care was the national standard is conclusory and without facts to support his actual knowledge." R. Vol. II, p. 413. Without any evidence that Dr. Schmid was personally familiar with the alleged national standard of health care practice pertaining to PPH, his statements to Dr. Scoma that the Twin Falls standard was the same as the national standard of care could not serve as the foundation for Dr. Scoma becoming familiar with the Twin Falls standard of health care practice. In other words, if Dr. Schmid was not familiar with the national standard of care and/or Dr. Schmid did not know what Dr. Scoma understood the national standard of care to be, his statements to Dr. Scoma that the Twin Falls standard of care was the same as the national standard of care could not convey any meaningful information to Dr. Scoma as to what the Twin Falls standard of care was. As a result, Dr. Scoma has still not properly familiarized himself with the Twin Falls standard of care.

The foundation as to how Dr. Schmid was familiar with the standard of care is absolutely necessary. Without any evidence that Dr. Schmid was personally familiar with the alleged national standard of health care practice pertaining to PPH, his statements to Dr. Scoma that the Twin Falls standard was the same as the national standard of care could not serve as the foundation for Dr. Scoma becoming familiar with the Twin Falls standard of health care practice. As a result, Dr. Scoma has still not properly familiarized himself with the Twin Falls standard of care.

3. *There is no evidence establishing that Dr. Scoma was familiar with the national standard of care.*

There is no evidence that Dr. Scoma has personal knowledge of the alleged national standard of care. The Idaho Supreme Court has stated that where an expert demonstrates "that a local standard does not vary from the national standard, **coupled with the expert's personal knowledge of the national standard**, is sufficient to lay a foundation for the expert's opinion." *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51 (2000) (emphasis added); *see also Suhadolnik v. Pressman*, 151 Idaho 110, 116 (2011) (stating that "where an expert demonstrates that a local standard of care has been replaced by a statewide or national standard of care, and further demonstrates that he or she is familiar with the statewide or national standard, the foundational requirements of I.C. § 6-1013 have been met").

There is no statement in Dr. Scoma's three affidavits or his deposition testimony that he has personal knowledge of the alleged national standard of care. In his first Affidavit Dr. Scoma states that he discussed the applicable standard of care with Dr. Schmid and based on that conversation Dr. Scoma determined that the "standard of care does not deviate from the national standard of care and that, in fact, the national standard of care had supplanted any local standard of care as of 2010" and that "Physicians in Idaho practiced in conformance with the national standard of care in 2010." R. Vol. I, p. 96-97, para. 5.

While Dr. Scoma mentions an alleged national standard of care, he does not state that he has personal knowledge of the claimed national standard of care. Nor does he state how he obtained personal knowledge of any such standard. "Conclusory statements that an expert is familiar with the local standard because he is familiar with the national standard are insufficient to meet the requirements of Idaho Code § 6-1013." *McDaniel v. Inland Northwest Renal Care Group*, 144,

Idaho 219, 223 (2007) (citing *Strode v. Lenzi*, 116 Idaho 214, 216(1989)). Based upon the current state of the record, the Court must simply assume that because Dr. Scoma is a board certified general and colorectal surgeon, he has personal knowledge of this alleged national standard of health care practice. Such an assumption is improper.

The Court cannot simply make this assumption. More foundation is required as *Perry v. Magic Valley Reg'l Med. Ctr.* and *Suhadolnik v. Pressman* make clear. Without demonstrating familiarity with or personal knowledge of this alleged national standard of care, Dr. Scoma is not qualified to make the determination that the local standard does not deviate from the national standard. Wickel has therefore failed to establish that Chamberlain breached the standard of care through the required expert testimony. As a result, all of his claims against Chamberlain should be dismissed.

IV.CONCLUSION

Wickel failed to show that there was an absence of other similarly situated health care providers in the community. Thus, the District Court erred in holding that the local standard of care for general surgeons in Idaho Falls in January 2010 was indeterminable with respect to the use of the PPH device.

Even assuming that the District Court was correct in determining that the local standard of care was indeterminable for PPH procedures, that did not relieve Wickel of establishing the Idaho Falls standard of health care in January, 2010 as to all other issues. Wickel has also failed to establish through an expert adequately familiar with the applicable standard of care that Chamberlain breached the local standard of care regarding the additional alleged breaches. Consequently, these additoinal claims should be dismissed.

The District Court also erred when it considered new evidence on Wickel's *Motion for Reconsideration.* The District Court had entered a final judgment precluding it from considering new evidence pursuant to I.R.C.P. 11(a)(2)(B) and *Boise Mode.* The District Court should have considered Wickel's *Motion for Reconsideration* as a Rule 59(e) motion and made its ruling based upon the record at the time the *Final Judgment* was entered. Further, the District Court should have granted Chamberlain's *Moiton to Strike the Supplemental Affidavit of Dr. Scoma.* It contained speculative and conclusory statements regarding Dr. Schmid's familiarity with the national standard of care and the purported Idaho standard of care. This Court should also adopt the sham affidavit doctrine to protect opposing parties and strike the *Supplemental Affidavit of Dr. Scoma* under the same. The Court should not sanction an expert witness testifying under oath to one thing and then providing different testimony later in order to avoid summary judgment. Such a practice is unfair and prejudicial to the opposing party.

Finally, Wickel has failed to establish that Dr. Scoma or Dr. Schmid were familiar with the national standard of care in January, 2010. There is only speculative and conclusory testimony that states they were familiar with the national standard of care. This testimony fails to establish how they became familiar with the national standard of care. This testimony is insufficient under Idaho law to establish that they were indeed familiar with the national standard of care. Wickel has therefore failed to establish that Chamberlain breached the standard of care through the required expert testimony. As a result, all of his claims against Chamberlain should be dismissed.

DATED this 6 day of August, 2014.

THOMSEN HOLMAN WHEILER, PLLC

By: _____
Richard R. Friess, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 7th day of August, 2014 I caused two (2) true and correct copies of the foregoing **CROSS APPELLANT'S BRIEF** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

MICHAEL D. GAFFNEY
JOHN M. AVONDET
BEARD ST CLAIR GAFFNEY PA
2105 CORONADO
IDAHO FALLS ID 83404-7495

[ ] Mail
[X] Hand Delivery
[ ] Facsimile@529-9732

THOMSEN HOLMAN WHEILER, PLLC

By: _____
Richard R. Friess, Esq.